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2 **UNITED STATES DISTRICT COURT**  
3 **DISTRICT OF NEVADA**

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5 JOSEPH SARUBY,

6 Plaintiff,

7 v.

8 NANCY A. BERRYHILL, Acting  
9 Commissioner of Social Security  
Administration,

10 Defendant.  
11

Case No. 2:17-cv-00150-CWH

**ORDER**

12 The case involves review of an administrative action by the Commissioner of Social  
13 Security (“Commissioner”) denying Plaintiff Joseph Saruby’s (“Plaintiff”) application for  
14 disability insurance benefits under Titles II and XVI of the Social Security Act. The court has  
15 reviewed Plaintiff’s motion to remand (ECF No. 22), filed January 31, 2018, the Commissioner’s  
16 response and cross-motion to affirm (ECF No. 23), filed March 1, 2018. Plaintiff did not file a  
17 reply. The parties consented to have a United States magistrate judge conduct all proceedings in  
18 this case and order entry of a final judgment under 28 U.S.C. § 636(c). (Consent (ECF No. 10).)

19 **A. BACKGROUND**

20 **1. Procedural History**

21 On September 20, 2011, Plaintiff applied for disability insurance benefits and  
22 supplemental security income under Titles II and XVI of the Act, alleging an onset date of May  
23 27, 2010. AR<sup>1</sup> 84-85, 116-17, 176-91. Plaintiff’s claim was denied initially, and on  
24 reconsideration. AR 126-32. A hearing was held before an Administrative Law Judge (“ALJ”)  
25 on April 22, 2015. AR 22. On June 17, 2015, the ALJ issued a decision finding Plaintiff was not  
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28 <sup>1</sup> AR refers to the Administrative Record in this matter. (Notice of Manual Filing (ECF No. 12).)

1 disabled. AR 22-35. The ALJ's decision became the Commissioner's final decision when the  
2 Appeals Council denied review. AR 1-4. Plaintiff, on January 17, 2017, commenced this action  
3 for judicial review under 42 U.S.C. §§ 405(g). *See* ECF Nos. 1, 4.

## 4 **2. The ALJ Decision**

5 The ALJ followed the five-step sequential evaluation process set forth in 20 C.F.R.  
6 §§ 404.1520 and 416.920. AR 23-24. At step one, the ALJ found that Plaintiff had not engaged  
7 in substantial gainful activity from the amended alleged onset date of April 4, 2010. AR 24. At  
8 step two, the ALJ found that Plaintiff had medically determinable "severe" impairments of  
9 degenerative disc disease of the lumbar spine. AR 25. At step three, the ALJ found that Plaintiff  
10 did not have an impairment or combination of impairments that met or medically equaled a listed  
11 impairment in 20 CFR Part 404, Subpart P, Appendix 1. AR 27. At step four, the ALJ found that  
12 the claimant has the residual functional capacity to perform the full range of light work as defined  
13 in 20 CFR 404.1567(b) and 416.967(b). AR 27. Relying on vocational expert testimony, the ALJ  
14 found that Plaintiff is capable of performing past relevant work as a real estate agent. AR 34.  
15 Accordingly, the ALJ concluded that Plaintiff was not under a disability at any time from April 5,  
16 2010, through the date of the decision, on June 17, 2015. AR 34.

## 17 **B. DISCUSSION**

### 18 **1. Standard of Review**

19 Administrative decisions in social security disability benefits cases are reviewed under 42  
20 U.S.C. § 405(g). *See Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). Section 405(g)  
21 states: "Any individual, after any final decision of the Commissioner of Social Security made  
22 after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a  
23 review of such decision by a civil action . . . brought in the district court of the United States for  
24 the judicial district in which the plaintiff resides." The court may enter "upon the pleadings and  
25 transcripts of the record, a judgment affirming, modifying, or reversing the decision of the  
26 Commissioner of Social Security, with or without remanding the cause for a rehearing." *Id.* The  
27 Ninth Circuit reviews a decision affirming, modifying, or reversing a decision of the  
28 Commissioner *de novo*. *See Batson v. Commissioner*, 359 F.3d 1190, 1193 (9th Cir. 2004).

1 The Commissioner's findings of fact are conclusive if supported by substantial evidence.  
2 See 42 U.S.C. § 405(g); *Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005). However, the  
3 Commissioner's findings may be set aside if they are based on legal error or not supported by  
4 substantial evidence. See *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir.  
5 2006); *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). The Ninth Circuit defines  
6 substantial evidence as "more than a mere scintilla but less than a preponderance; it is such  
7 relevant evidence as a reasonable mind might accept as adequate to support a conclusion."  
8 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995); see also *Bayliss v. Barnhart*, 427 F.3d  
9 1211, 1214 n.1 (9th Cir. 2005). In determining whether the Commissioner's findings are  
10 supported by substantial evidence, the court "must review the administrative record as a whole,  
11 weighing both the evidence that supports and the evidence that detracts from the Commissioner's  
12 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); see also *Smolen v. Chater*, 80  
13 F.3d 1273, 1279 (9th Cir. 1996).

14 Under the substantial evidence test, findings must be upheld if supported by inferences  
15 reasonably drawn from the record. *Batson*, 359 F.3d at 1193. When the evidence will support  
16 more than one rational interpretation, the court must defer to the Commissioner's interpretation.  
17 See *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); *Flaten v. Sec'y of Health and Human*  
18 *Serv.*, 44 F.3d 1453, 1457 (9th Cir. 1995). Consequently, the issue before the court is not whether  
19 the Commissioner could reasonably have reached a different conclusion, but whether the final  
20 decision is supported by substantial evidence. It is incumbent on the ALJ to make specific  
21 findings so that the court does not speculate as to the basis of the findings when determining if the  
22 Commissioner's decision is supported by substantial evidence. Mere cursory findings of fact  
23 without explicit statements as to what portions of the evidence were accepted or rejected are not  
24 sufficient. *Lewin v. Schweiker*, 654 F.2d 631, 634 (9th Cir. 1981). The ALJ's findings "should  
25 be as comprehensive and analytical as feasible, and where appropriate, should include a statement  
26 of subordinate factual foundations on which the ultimate factual conclusions are based." *Id.*

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## 2. Disability Evaluation Process

The individual seeking disability benefits has the initial burden of proving disability. *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir 1995). To meet this burden, the individual must demonstrate the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A). More specifically, the individual must provide “specific medical evidence” in support of her claim for disability. 20 C.F.R. § 404.1514. If the individual establishes an inability to perform her prior work, then the burden shifts to the Commissioner to show that the individual can perform other substantial gainful work that exists in the national economy. *Reddick*, 157 F.3d at 721.

The ALJ follows a five-step sequential evaluation process in determining whether an individual is disabled. *See* 20 C.F.R. § 404.1520; *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987). If at any step the ALJ determines that he can make a finding of disability or nondisability, a determination will be made and no further evaluation is required. *See* 20 C.F.R. § 404.1520(a)(4); *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003). Step one requires the ALJ to determine whether the individual is engaged in substantial gainful activity (“SGA”). 20 C.F.R. § 404.1520(b). SGA is defined as work activity that is both substantial and gainful; it involves doing significant physical or mental activities usually for pay or profit. *Id.* § 404.1572(a)-(b). If the individual is engaged in SGA, then a finding of not disabled is made. If the individual is not engaged in SGA, then the analysis proceeds to the step two. Step two addresses whether the individual has a medically determinable impairment that is severe or a combination of impairments that significantly limits her from performing basic work activities. *Id.* § 404.1520(c). An impairment or combination of impairments is not severe when medical and other evidence establishes only a slight abnormality or a combination of slight abnormalities that would have no more than a minimal effect on the individual’s ability to work. *Id.* § 404.1521; *see also* Social Security Rulings (“SSRs”) 85-28, 96-3p, and 96-4p.<sup>2</sup> If the individual does not have a

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<sup>2</sup> SSRs constitute the SSA’s official interpretation of the statute and regulations. *See Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th Cir. 2009); *see also* 20 C.F.R. §

1 severe medically determinable impairment or combination of impairments, then a finding of not  
2 disabled is made. If the individual has a severe medically determinable impairment or  
3 combination of impairments, then the analysis proceeds to step three.

4 Step three requires the ALJ to determine whether the individual's impairments or  
5 combination of impairments meet or medically equal the criteria of an impairment listed in 20  
6 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 404.1520(d), 404.1525, and 404.1526. If  
7 the individual's impairment or combination of impairments meet or equal the criteria of a listing  
8 and the duration requirement (20 C.F.R. § 404.1509), then a finding of disabled is made. 20  
9 C.F.R. § 404.1520(h). If the individual's impairment or combination of impairments does not  
10 meet or equal the criteria of a listing or meet the duration requirement, then the analysis proceeds  
11 to step four.

12 Before moving to step four, however, the ALJ must first determine the individual's  
13 residual functional capacity ("RFC"), which is a function-by-function assessment of the  
14 individual's ability to do physical and mental work-related activities on a sustained basis despite  
15 limitations from impairments. *See* 20 C.F.R. § 404.1520(e); *see also* SSR 96-8p. In making this  
16 finding, the ALJ must consider all the relevant evidence, such as all symptoms and the extent to  
17 which the symptoms can reasonably be accepted as consistent with the objective medical  
18 evidence and other evidence. 20 C.F.R. § 404.1529; *see also* SSRs 96-4p and 96-7p. To the  
19 extent that statements about the intensity, persistence, or functionally limiting effects of pain or  
20 other symptoms are not substantiated by objective medical evidence, the ALJ must make a  
21 finding on the credibility of the individual's statements based on a consideration of the entire case  
22 record. The ALJ must also consider opinion evidence in accordance with the requirements of 20  
23 C.F.R. § 404.1527 and SSRs 96-2p, 96-5p, 96-6p, and 06-3p.

24 Step four requires the ALJ to determine whether the individual has the RFC to perform  
25 her past relevant work ("PRW"). 20 C.F.R. § 404.1520(f). PRW means work performed either

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27 402.35(b)(1). They are entitled to some deference as long as they are consistent with the Social  
28 Security Act and regulations. *Bray*, 554 F.3d at 1223 (finding ALJ erred in disregarding SSR 82-  
41).

1 as the individual actually performed it or as it is generally performed in the national economy  
2 within the last 15 years or 15 years before the date that disability must be established. In  
3 addition, the work must have lasted long enough for the individual to learn the job and performed  
4 at SGA. 20 C.F.R. §§ 404.1560(b) and 404.1565. If the individual has the RFC to perform her  
5 past work, then a finding of not disabled is made. If the individual is unable to perform any PRW  
6 or does not have any PRW, then the analysis proceeds to step five.

7 The fifth and final step requires the ALJ to determine whether the individual is able to do  
8 any other work considering her RFC, age, education, and work experience. 20 C.F.R.  
9 § 404.1520(g). If she is able to do other work, then a finding of not disabled is made. Although  
10 the individual generally continues to have the burden of proving disability at this step, a limited  
11 burden of going forward with the evidence shifts to the Commissioner. The Commissioner is  
12 responsible for providing evidence that demonstrates that other work exists in significant numbers  
13 in the national economy that the individual can do. *Yuckert*, 482 U.S. at 141-42.

### 14 **3. Analysis**

15 Plaintiff moves to remand this matter because the ALJ failed to articulate clear and  
16 convincing reasons for rejecting Plaintiff's testimony. Plaintiff argues that he testified regarding  
17 the nature and extent of his condition, and the ALJ provided insufficient reasons to reject his  
18 testimony, and instead set forth boilerplate language in making his credibility determination and  
19 indicating that the testimony is not credible because it lacks support in the objective medical  
20 evidence. The Commissioner responds that Plaintiff set forth numerous specific reasons to reject  
21 Plaintiff's testimony.

22 The Commissioner's regulations prohibit granting disability benefits based solely on a  
23 claimant's subjective complaints. *See* 20 C.F.R. § 404.1529(a) ("statements about your pain or  
24 other symptoms will not alone establish that you are disabled"). "An ALJ cannot be required to  
25 believe every allegation of [disability], or else disability benefits would be available for the  
26 asking, a result plainly contrary to [the Social Security Act]." *Fair v. Bowen*, 885 F.2d 597, 603  
27 (9th Cir. 1989). If the ALJ rejects the claimant's complaints, the ALJ must provide "specific,  
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1 cogent reasons for the disbelief.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995) (quoting  
2 *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990)).

3 The ALJ must state why the testimony is unpersuasive and must point to what specific  
4 testimony or evidence undermines the claimant’s testimony. *Morgan v. Comm’r of Soc. Sec.*  
5 *Admin.*, 169 F.3d 595, 599 (9th Cir. 1999); *Lester*, 81 F.3d at 834. Absent affirmative evidence  
6 that the claimant is malingering, the ALJ’s reasons for rejecting the claimant’s testimony must be  
7 clear and convincing. *Valentine v. Comm’r Social Sec. Admin.*, 574 F.3d 685, 693 (9th Cir.  
8 2009). The ALJ “may not reject a claimant’s subjective complaints based solely on a lack of  
9 medical evidence to fully corroborate the alleged severity of pain.” *Burch v. Barnhart*, 400 F.3d  
10 676, 680 (9th Cir. 2005). This is because the lack of an objective medical basis is just one factor  
11 in evaluating the credibility of a claimant’s testimony and complaints. *Bunnell v. Sullivan*, 947  
12 F.2d 341, 345 (9th Cir. 1991) (en banc).

13 The Ninth Circuit has upheld an ALJ’s finding that a claimant’s testimony is not credible  
14 when the ALJ cited specific instances in the record supporting this determination. *See, e.g.,*  
15 *Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007) (upholding ALJ’s credibility determination  
16 when he pointed out numerous lab results that contradicted his subjective complaints). *See also,*  
17 *Batson v. Comm’r of Soc Sec. Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2003) (ALJ’s credibility  
18 determination upheld because the ALJ cited specific testimony from a doctor which contradicted  
19 the claimant’s allegations). But the Ninth Circuit has also found general findings insufficient.  
20 *See Robbins v. Social Sec. Admin.*, 466 F.3d 880, 884-85 (9th Cir. 2006) (ALJ required to provide  
21 a “narrative discussion” and state specific evidence in the record supporting an adverse credibility  
22 finding). If “evidence can support either affirming or reversing the ALJ’s decision,” this Court  
23 may not substitute its judgment for that of the ALJ’s. *Id.* at 882.

24 In making a credibility determination regarding pain, the ALJ may consider: “the nature,  
25 location, onset, duration, frequency, radiation, and intensity of any pain; precipitating and  
26 aggravating factors (e.g., movement, activity, environmental conditions); type, dosage,  
27 effectiveness, and adverse side effects of any pain medication; treatment, other than medication,  
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1 for relief of pain; functional restrictions; the claimant's daily activities" and "ordinary techniques  
2 of credibility evaluation." *Bunnell*, 947 F.2d at 346 (citing SSR 88-13).

3 The ALJ found that Plaintiff provided inconsistent statements concerning his drug and  
4 alcohol use. AR 31. See 20 C.F.R. § 404.1529(c)(4) ("We will consider whether there are any  
5 inconsistencies in the evidence and the extent to which there are any conflicts between your  
6 statements and the rest of the evidence."); *Thomas v. Barnhart*, 278 F.3d 948, 959 (9th Cir. 2002)  
7 (in discounting credibility in general, "the ALJ found that [the claimant] had not 'been a reliable  
8 historian, presenting conflicting information about her drug and alcohol usage'"). The ALJ  
9 indicated that Plaintiff had made inconsistent statements regarding his drug and alcohol use,  
10 denying any alcohol problem yet attending a 28 day in-patient rehabilitation program and being  
11 later arrested for a DUI. AR 31, AR 60-61. As a technique of ordinary credibility evaluation, the  
12 ALJ properly considered Plaintiff's conflicting statements regarding his substance-abuse history.

13 Second, the ALJ found that the medical-opinion evidence starkly contradicted Plaintiff's  
14 allegations of disabling pain and limitations. AR 30-31. See 20 C.F.R. § 404.1529; *Maier v.*  
15 *Comm'r of Soc. Sec.*, 154 F.3d 913, 915 (9th Cir. 1998) ("The ALJ's explanation that [the  
16 claimant] was not credible was supported by the clear and convincing reason that [the claimant's]  
17 testimony contradicts most of the medical evaluations"). In particular, the ALJ summarized the  
18 opinions of Drs. Sherman, Mumford, and Arnow, physicians who evaluated Plaintiff's physical  
19 functional capabilities, and noted that all three found Plaintiff was far more capable than the light  
20 work RFC. AR 31-32. Plaintiff fails to address these findings.

21 Third, the ALJ discussed medical evidence that did not corroborate the degree of pain and  
22 limitations Plaintiff alleged and revealed a level of functioning consistent with the RFC for light  
23 work. AR 26-28, 30-32. See 20 C.F.R. § 404.1529(c)(2), (4); *Stubbs-Danielson v. Astrue*, 539  
24 F.3d 1169, 1175 (9th Cir. 2008) (affirming adverse credibility finding in part because the  
25 claimant's alleged symptoms were "disproportionate and not supported by the objective medical  
26 findings nor any other corroborating evidence"). To the contrary, the ALJ noted that Drs.  
27 Mumford and Sherman found that Plaintiff's knee and back function were within normal limits.  
28 Plaintiff fails to address these findings.



1 Fourth, the ALJ noted gaps in Plaintiff's treatment history, which undermined the extreme  
2 degree of symptoms and limitations he alleged. AR 25, 29–30. *See* 20 C.F.R. §  
3 404.1529(c)(3)(iv); *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (holding ALJ may  
4 consider unexplained or inadequately explained failure to seek treatment or follow a prescribed  
5 course of treatment). For example, Plaintiff did not obtain any significant treatment for his  
6 allegedly disabling back pain from approximately 2011 through 2013. AR 29–30. Plaintiff fails  
7 to address these findings.

8 Fifth, the ALJ discussed Plaintiff's activities of daily living which demonstrated a greater  
9 range of functioning than Plaintiff alleged. AR 25–26. *See* 20 C.F.R. § 404.1529; *Tommasetti v.*  
10 *Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) ("The ALJ may consider many factors in weighing a  
11 claimant's credibility," including "the claimant's daily activities"). The ALJ noted that the  
12 Plaintiff made inconsistent statements in function reports regarding his activities of daily living.  
13 AR 31.

14 Accordingly, the ALJ's provided clear and convincing reasons for rejecting the claimant's  
15 testimony. *Valentine*, 574 F.3d at 693. The ALJ's credibility analysis was supported by  
16 substantial evidence, and it is entitled to great deference. *See Parra*, 481 F.3d at 750 (questions  
17 of credibility and resolution of conflicts in the testimony are functions solely for the agency).

### 18 **C. CONCLUSION**

19 Viewing the evidence as a whole, the court finds that the ALJ's determination that  
20 Plaintiff is not disabled is supported by substantial evidence.

21 IT IS HEREBY ORDERED that Plaintiff's Motion to Remand (ECF No. 22) is denied.

22 IT IS FURTHER ORDERED that the Commissioner's cross-motion to affirm (ECF No.  
23 23) is GRANTED.

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1 IT IS FURTHER ORDERED that the clerk of court must enter judgment in favor of  
2 Nancy A. Berryhill, Acting Commissioner of Social Security Administration, and against plaintiff  
3 Joseph Saruby.

4 DATED: February 7, 2019

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6 C.W. HOFFMAN, JR.  
7 UNITED STATES MAGISTRATE JUDGE  
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